Office-Supreme Court, U.S.
FILED
OCT 23 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-329

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

In re Grand Jury Proceedings
The Bank of Nova Scotia

THE BANK OF NOVA SCOTIA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE GOVERNMENT OF CANADA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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October 23, 1984

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

20pp

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BRIEF OF THE GOVERNMENT OF CANADA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI *

THE INTEREST OF THE AMICUS CURIAE

A. Statement of the Issues

The petition for certiorari in this case presents two questions for review: one is the proper resolution of a

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* Both Petitioner and Respondent have consented to the appearance of the Government of Canada as an amicus curiae, and the written consents are on file with the Clerk. The Government of Canada previously appeared as an amicus curiae in this matter, supporting the Petitioner before the Court of Appeals for the Eleventh Circuit and on remand before the U.S. District Court for the Southern District of Florida. The decision below is reported at 740 F.2d 817.

dispute involving a nonparty custodian, Petitioner, the Bank of Nova Scotia, caught between conflicting commands of two states in which it transacts business; the other concerns the lawfulness of the imposition and aggregation against that custodian of that portion of the fine imposed for contempt concerning its conduct in a third state.

The first issue involves the U.S. courts' failure to recognize the May 31, 1983 order of the Grand Court of the Cayman Islands, which specifically prohibited the Bank from producing documents located in the Cayman Islands, as legitimately taking precedence over the contrary October 20, 1983 order of the U.S. District Court. The second issue primarily involves whether the Bank substantially and in good faith complied with the subpoena of documents from the Commonwealth of the Bahamas after the Bahamian Attorney General had determined that Bahamian law did not prevent compliance.

This Brief, like the prior submissions on behalf of Canada in this case, is limited to the first question, *i.e.*, the permissibility under international and United States law of an enforcement action whereby foreign nationals in the United States are punished for complying in third countries with the law of those countries properly applied to matters within their territory.

In its second opinion in this case (Pet. App. A), the Court of Appeals devoted most of its efforts to the Bank's conduct in inspecting its files in the Bahamas, and paid little attention to the more basic issues—*i.e.*, how the Bank should behave in the face of directly conflicting commands, and the respect due in the United States to the judgment of a foreign court, in this case the Cayman court. The subsequent diligence or nondiligence of the Bank in the Bahamas is irrelevant to the effect of Cayman law and to the order of the Cayman court. The Government of Canada seeks herein to focus the atten-

tion of this Court on the conflict caused by the directly opposing orders of the U.S. and Cayman courts.

B. The Interest of the Government of Canada

The Government of Canada is submitting this Brief in support of the petition for certiorari because the decision below threatens important and legitimate interests of the Canadian government and Canadian banks engaged in international commerce. The present case carries implications far beyond that of a single event or episode. It is the importance of having these broader implications recognized that has persuaded the Government of Canada of the advisability of placing its views directly before this Court. There are three principal concerns:

—First, it may establish a principle of U.S. law that Canadian and other foreign multinational enterprises owe a higher loyalty to the United States than to their home or host sovereigns for conduct in their home or host territory. Such a principle would undermine Canadian authority to govern Canadian residents and nationals in Canada.

—Second, the governments of the United States and Canada have engaged for more than three decades in efforts to resolve the inevitable conflicts of jurisdiction between two nations which share not only a continent but also strongly intertwined economies. The Government of Canada is anxious to preserve and improve these cooperative efforts, and to see that they are not jeopardized by precedents that could adversely affect Canadian or American companies with multinational operations.

—Third, the Government of Canada is deeply interested in the viability and good order of the international banking system, and in enhanced cooperation among supervisory authorities in the major financial centers. If each nation is free unilaterally to undermine explicit foreign governmental

> regulations directly affecting persons within foreign territories, the uncertainties and costs of doing business internationally for Canadian persons and enterprises will increase, and all major trading nations, including the United States as well as Canada, will suffer.

Each of these concerns will be spelled out more fully if review is granted.

ARGUMENT

I. UNDER PRINCIPLES OF INTERNATIONAL AND UNITED STATES LAW, PERSONS MAY NOT BE ORDERED TO VIOLATE THE LAW OF ANOTHER STATE WITHIN THAT STATE

The principle that a person may not be placed in a position that whatever it does subjects it to sanction is deeply rooted in basic concepts of fairness. It is borne out by a series of cases in the United States, particularly the cartel cases brought shortly after World War II. *United States v. General Electric Co.*, 82 F. Supp. 753 (D.N.J. 1949), 115 F. Supp. 835 (D.N.J. 1953) (United States-Netherlands); *United States v. Imperial Chemical Industries*, 100 F. Supp. 504 (S.D.N.Y. 1951), 105 F. Supp. 215 (S.D.N.Y. 1952) (United States-United Kingdom). The rule is succinctly stated in the *Restatement of the Foreign Relations Law of the United States (Revised)* § 419(1):[1]

> (1) A person may not ordinarily be required by authority of [one state]
>
> (a) to do an act outside [that state] prohibited by the law of the state where the act is to be done . . .; or
>
> (b) to refrain from doing an act outside [one state] required by the law of the state where the act is to be done . . .

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[1] *Restatement of the Foreign Relations Law of the United States (Revised)* § 419(1) (Tent. Draft No. 3, 1982).

Section 419 sets forth two principles: one concerning territorial preference, the other concerning conflict avoidance.[2] Both principles apply here.

A. Conflicting Sovereign Commands Are to be Resolved in Favor of the Territorial State, Here the Cayman Islands

International law, starting from the basic notions of sovereignty and the sovereign equality of states, accords primacy to regulations of states—whether by statute, order of a court, or otherwise—taken within their own territory. *See, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964). That general principle applies in this situation as well, where two states issued directly conflicting commands.[3]

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[2] The Court of Appeals questioned the reliance by the Government of Canada on the Restatement, pointing out that that work is only in tentative form at present. (Pet. App. 19a n.17). But while the Court of Appeals disagreed with Petitioner as to the application of the territorial preference to the present facts, see p. 6 *infra*, it seems inconceivable that this Court would reject the essential principle of conflict avoidance as stated in § 419.

[3] *See Restatement (Revised), supra*, § 419 Comment b, "The territorial preference." The Court of Appeals rejected the Restatement (Revised) position concerning the territorial preference as "not reflecting the current law of the United States." (Pet. App. 19a n.17). Whether or not that is the case, and we doubt it, substantial *international* legal authority certainly supports the principle of the territorial state's primacy. *See, e.g.*, Int'l Law Ass'n, *Report of the Fifty-First Conference* 407, 565-92 (1965) (collecting examples of objections by foreign governments to U.S. extraterritorial discovery demands); A.V. Lowe, *Extraterritorial Jurisdiction: An Annotated Collection of Legal Materials* 79-225 (1983) containing statutes and primary source documents of foreign governments objecting to U.S. extraterritorial claims); 2 J. Atwood & K. Brewster, *Antitrust and American Business Abroad* § 15.10, at 228 (2d ed. 1981).

It is worth noting that the question of preference is usually considered by courts and commentators as pitting the territorial state against a state exercising jurisdiction on the basis of na-

Whether the issue involved here was *doing* an act, (*i.e.*, disclosing the information requested) or *refraining from doing* an act, (*i.e.*, preserving the confidential character of the banking records in question), the U.S. command to the Bank was to be carried out in the Cayman Islands. The statement of the Court of Appeals that "the Cayman Grand Court purported to control conduct in the United States" (Pet. App. 26a) is clearly mistaken. The records and the information sought by the grand jury were located in the Cayman Islands, and the Grand Court sought to control conduct *only* in the Cayman Islands.

An analogous situation might occur, for example, if the government of a Middle Eastern state in which the Bank of Nova Scotia maintains an office issued an order requiring the Bank to disclose information concerning the alleged business relations between a customer of its Miami office and Israel. For the Miami office to supply that information would violate the foreign political boycott provisions of the Export Administration Act of 1979, 50 U.S.C. App. § 2407(a)(1)(D) (1982), and would place the Bank in a situation of irreconcilable commands. It would surely be the position of the United States, including the Department of Commerce and any U.S. court that might hear the issue, that disclosure or nondisclosure of the information was an activity centered in the United States. The United States would surely protest, as would Canada, if the Middle Eastern state imposed sanctions on the Bank of Nova Scotia for obeying U.S. law in the United States.

U.S. law has modified the rule according preference to the territorial state by requiring persons before the court to make good faith efforts to secure release or waiver from statutory prohibitions. *See, e.g, Restate-*

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tionality. In the present case, of course, the basis of jurisdiction of the non-territorial state (the United States) is not nationality, but mere presence of an agency of the Bank not involved with the documents at issue.

ment (Revised), supra, § 420(2). But the Restatement clearly limits contempt sanctions to *parties*, and until this case and *United States v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 3086 (1983) (*"Bank of Nova Scotia I"*), no court in the United States had imposed contempt on nonparty custodians, where the information sought was at all relevant times located outside the United States, and the U.S. attorney made no effort to justify the U.S. government's need for the disclosure (other than asserting the institutional importance of all grand juries), and in particular failed to demonstrate that alternative intergovernmental avenues to obtain the evidence were exhausted.[4]

B. The Sanctions Imposed by the District Court Show an Unprecedented Disregard for the Judgment of a Foreign Court

No prior U.S. case is known in which an American court has ordered any person before it, let alone a nonparty, noninvestigatory target, to act in defiance of the order of a foreign court. Yet that is just what the District Court did in the present case in its order of October 20, 1983, as upheld by the Court of Appeals.

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[4] We note by way of analogy that U.S. courts have been unwilling, absent a balancing test showing an overriding need, to sustain contempt findings against officials of American states who have declined to furnish information to federal grand juries on the basis of state laws. *See, e.g., In re Hampers*, 651 F.2d 19 (1st Cir. 1981); *In re Cruz*, 561 F. Supp. 1042 (D. Conn. 1983); *In re Grand Jury Empanelled Jan. 21, 1981*, 535 F. Supp. 537 (D.N.J. 1982). If the interest of a state of the United States is sufficient to sustain a qualified privilege of confidentiality and to require federal law enforcement officials to show a sufficiently particularized need to overcome that interest, notwithstanding the Supremacy Clause of the U.S. Constitution, art. VI, cl. 2, the interest of a foreign state would seem entitled to at least equal respect.

While the Government of Canada does not believe that even this type of balancing (which was not exercised by the courts below) is necessary or appropriate under international and U.S. law for *international* sovereign conflicts, it is prepared to address the issue if this Court grants certiorari.

The significance of the order of the Cayman court in the present case is threefold. *First*, it distinguishes this case from *Bank of Nova Scotia I*, *supra*, and *United States v. Field*, 532 F.2d 404 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976), in which no foreign court order was involved. *Second*, it distinguishes this case from other cases in which the plea that disclosure would violate the law of a foreign state was in doubt, either because the law itself was not clear, *see, e.g., United States v. First National City Bank*, 396 F.2d 897, 903-05 (2d Cir. 1968), or because it depended on the interest of the foreign state in the matter at issue and that interest was not clear. *See, e.g., United States v. Vetco*, 691 F.2d 1281, 1289 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981). In the present case, there could be no question at the time of the District Court's order on October 20, 1983, that the Cayman law applied, and that it prohibited the Bank's compliance with the subpoena.

Third, the judgment of the Grand Court of Cayman of May 31, 1983 met all the requirements for recognition and respect by the District Court. *See, e.g., Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972); *Restatement (Revised)*, *supra*, §§ 491-92 (Tent. Draft No. 4, 1983). No justification has been presented by the United States for declining to recognize this judgment. The May 31 judgment of the Cayman court was fully effective and binding on October 20, 1983, but was not even mentioned in the Order of that date issued by the District Court. There was no respect for foreign judgments, and no consideration of comity. The fact that a respected District Court could so disregard fundamental principles of relations among states and courts to the point of not even considering them shows the need for guidelines, and accordingly the need for review by this Court.

C. United States Law, in Conformity with International Law, Imposes Limits on the Extraterritorial Reach of Subpoenas: The Attempt to Use the Presence of the Bank in the United States to Circumvent These Limits Should Not Be Permitted

In the statute authorizing issuance of subpoenas to a person in a foreign country, 28 U.S.C. § 1783 (1982), incorporated by reference in Fed. R. Civ. P. 45(e)(2) and Fed. R. Crim. P. 17(e)(2), Congress provided for several limitations on use of the subpoena power, all in recognition of the relevant concerns of international law. *First*, such subpoenas may be issued only by the court, not by the clerk of the court or a grand jury. *Second*, such subpoenas may be issued only to nationals or residents of the United States. *Third*, such subpoenas may be issued only "if the court finds that particular testimony or the production of the document or other thing by him is necessary in the interest of justice." 28 U.S.C. § 1783(a) (1982).[5]

It is evident that the subpoena at issue here failed to meet the standards of section 1783 in several respects. The prosecution avoided initial screening by the court, as well as the territorial limits of the statute and Rules, by acting as if what was involved was a routine subpoena to a local bank. The theory apparently was that

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[5] The Senate Report accompanying the legislation that adopted the current version of Section 1783, Pub. L. 88-619, 78 Stat. 997 (1964), makes clear that

> In determining whether the issuance of a subpena is in the interest of justice, the court may take into account the nature of the proceedings, the nature of the testimony or the evidence sought, the convenience of the witness or the producer of the evidence, the convenience of the parties, and other facts bearing upon the reasonableness of requiring a person abroad to appear as a witness or to produce tangible evidence.

S. Rep. No. 1580, 88th Cong., 2d Sess. 10 (1964), *reprinted in* 1964 U.S. Code Cong. & Ad. News 3782, 3791; *see also* H.R. Rep. No. 1052, 88th Cong., 1st Sess. 10 (1963).

physical power over a single office and a few employees of the Bank in Miami gave the grand jury authority to require production of records from anywhere the Bank had an office—in this case some 1,200 offices in 52 countries on 6 continents. Some 45 foreign banks have representation in Miami; several hundred have representation in New York and other major American financial centers. It seems improbable that the U.S. Congress contemplated threats and sanctions against U.S. offices of foreign banks as a way around the restraints it placed on subpoenas issued under the authority of the United States, and no such intent should be imputed. *See Commodity Futures Trading Commission v. Nahas*, 738 F.2d 487 (D.C. Cir. 1984); *Federal Trade Commission v. Compagnie de Saint-Gobain-Pont-à-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980).[6]

Further, the device used by the grand jury and sustained by the District and Circuit Courts in this case seems contrary to the approach to exercise of judicial power (if not to the precise holding) taken by this Court in *Shaffer v. Heitner*, 433 U.S. 186 (1977). In *Shaffer*, this Court reversed the lower courts' attempt to exercise jurisdiction over a nonresident person on the basis of presence of intangible assets related to the nonresident by ownership but not linked in any way to the cause of action. Here, the lower courts have exercised jurisdiction over a nonresident (the Cayman office of a Canadian bank) on the mere basis of the presence of an affiliate office of the Bank, not linked in any way to the evidence or investigation in question.[7] *Shaffer* of course concerned

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[6] It will be recalled that in *Blackmer v. United States*, 284 U.S. 421 (1932), sanctions for failure to respond to a summons directed to a U.S. citizen residing in France were sustained, but only by virtue of the link of citizenship.

[7] The fact mentioned by the Court of Appeals that the Bank has offices in several U.S. cities (Pet. App. 19a n.18) takes nothing away from its status as a Canadian enterprise. According to its

only domestic interstate relations; its analysis is even more compelling in an international context.

II. THE SANCTIONS IMPOSED ARE CONTRARY TO THE POLICIES OF THE UNITED STATES (AND OF CANADA) TO MINIMIZE INTERGOVERNMENTAL CONFLICTS AND TO ENCOURAGE TRANSNATIONAL INVESTMENT AND BANKING

The United States, Canada, the United Kingdom and the other Western industrialized democracies participate in a number of international fora as part of an overall effort to reconcile intergovernmental conflicts and to promote international commerce. Two are particularly important here: the Organization for Economic Cooperation and Development ("OECD"),[8] and the Basle Concordat among central banks concerning international banking supervision.[9]

A. The OECD and Intergovernmental Conflict Resolution

On May 18, 1984, the OECD Council, meeting at the Ministerial level, agreed to strengthen bilateral and multi-

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Annual Report for 1983, the Bank had 20,279 shareholders, of whom approximately 96 percent were Canadian. It maintains over 1,200 offices throughout the world, of which 1,022 are located in Canada, 9 in the continental United States, and about 170 in some 50 other countries. If the decision below were to become a general precedent, it appears that any prosecutor (or possibly even a civil plaintiff) in any of the nine U.S. cities where the Bank is represented could obtain records maintained at any of the other 1,200 or so offices of the Bank in Canada and around the world, regardless of the local law applicable to those foreign branches.

[8] Convention on the Organization for Economic Cooperation and Development, Dec. 14, 1960, *entered into force* Sept. 30, 1961, 12 U.S.T. 1728, T.I.A.S. No. 4891, 888 U.N.T.S. 179. The twenty-four member countries of the OECD account for the vast majority of the world's trade and investment flows.

[9] The Basle Concordat is formally known as Principles for the Supervision of Banks' Foreign Establishments (1975, revised 1983). The current Concordat is reprinted in 12 Int'l Monetary Fund Survey 201 (1983). *See generally* pp. 13-14 *infra*.

lateral cooperation in intergovernmental conflicts involving multinational enterprises.[10] To this end, the Ministers reviewed the 1976 Declaration and Guidelines on International Investment and Multinational Enterprises, and in particular endorsed a series of recommendations concerning methods to ameliorate conflicting requirements imposed on multinational enterprises by various jurisdictions. The pertinent part of those recommendations states:

> 27. In contemplating new legislation, action under existing legislation or other exercise of jurisdiction which may conflict with the legal requirements or established policies of another Member country and lead to conflicting requirements being imposed on multinational enterprises, the Member countries concerned should:
>
> i) Have regard to relevant principles of international law;
>
> ii) Endeavour to avoid or minimise such conflicts and the problems to which they give rise by following an approach of moderation and restraint, respecting and accommodating the interests of other Member countries;
>
> iii) Take fully into account the sovereignty and legitimate economic, law enforcement and other interests of other Member countries; . . . .
>
> 28. Member countries should endeavour to promote co-operation as an alternative to unilateral action to avoid or minimise conflicting requirements and problems arising therefrom. Member countries should on request consult one another and endeavour to arrive at mutually acceptable solutions to such problems.[11]

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[10] Organization for Economic Cooperation and Development, PRESS/A (84)28, ¶ 36 (May 18, 1984).

[11] Organization for Economic Cooperation and Development, *International Investment and Multinational Enterprises: The 1984 Review of the 1976 Declaration and Decisions* 26 (1984).

The United States participated in this endorsement. The actions of the U.S. Attorney and the decisions of the courts below are inconsistent with the spirit and intent of this United States policy commitment.

It is not for the Government of Canada to say how the United States government should have carried out its obligation to mitigate the conflict. For instance, it might have given such support to the Bank in its application to the Cayman Court as to make that application viable. It might have resorted to the so-called "Gentlemen's Agreement" between the United States and the Cayman Islands (Opinion of the Court of Appeals, Pet. App. 20a-23a). Alternatively, the United States might have sought international judicial assistance through letters rogatory, or it might have resorted to diplomatic channels, directly with the Cayman Islands or with the assistance of the United Kingdom and Canada. Canada recognizes the interest of the lower courts in preserving the investigatory powers of the grand jury (Pet. App. 12a-14a). It does not follow, however, that the obligation of states to avoid conflicts—and especially conflicts that catch third country nonparty nationals in the middle—is removed or discharged because a grand jury is conducting an investigation.

B. International Cooperation in Multinational Banking

In recent years the major banking countries have come to realize that it is now necessary for host and home states to cooperate in allocating supervisory responsibility for transnational banking operations as to issues of solvency, liquidity, foreign exchange and soundness of operations generally. The Basle Concordat has established the framework for such an international supervisory system.[12] Under that agreement, gaps in regulation are to

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[12] The parties to the Concordat are the central banks of Belgium, Canada, the Federal Republic of Germany, France, Italy, Japan, Luxembourg, the Netherlands, Sweden, Switzerland, the United Kingdom and the United States.

be filled by either host or home state, and overlaps are to be worked out between the regulatory authorities of the two states having jurisdiction so as to avoid conflict and uncertainty.

Such international banking cooperation and the commercial stability and fairness it seeks is undermined when one host state, or rather particular law enforcement authorities in one host state among many, resort to ad hoc unilateral coercion. In its decision below, the Court of Appeals said:

> The Bank has voluntarily elected to do business in numerous foreign host countries and has accepted the incidental risk of occasional inconsistent governmental actions. It cannot expect to avail itself of the benefits of doing business here without accepting the concomitant obligations.

(Pet. App. 19a-20a). The Government of Canada submits that inconsistent government orders are not "incidental" or "occasional" problems for multinational banks and business enterprises, but are a significant disincentive to doing business on a global scale.

This case presents a suitable vehicle for this Court to address—none too soon—the problem of adjusting national laws written with quite different problems in mind to the age of global business and global banking.

CONCLUSION

This Court has not had occasion since *Société Internationale pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197 (1958), to address the conflicting demands of disclosure and confidentiality across international frontiers. It has never addressed in this context the particular and widespread problem of nonparty intermediaries and custodians of information, such as multinational banks. Moreover, this Court has never addressed the question of balancing of competing state

interests where U.S. extraterritorial jurisdiction is being asserted.

Numerous lower court cases in the United States have considered these issues, with inconsistent and confusing results, certainly as to U.S. law and sometimes also as to international legal requirements. The present case provides an opportunity for this Court to fill a pressing need for guidance—to lower courts, to U.S. prosecutors, and to multinational banks doing business in the United States.

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

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October 23, 1984